United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1179

To be argued by
PETER D. SUDLER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1179

UNITED STATES OF AMERICA,
Appellee,

—v.—

CALVIN YAGID,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Calvin Yagid appeals from a judgment of conviction entered on February 27, 1976, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 74 Cr. 1216, in six counts, was filed December 30, 1974. All six counts charged that on October 7, 1974, Calvin Yagid appeared before a special grand jury and made false declarations in violation of Title 18, United States Code, Section 1623.

Trial commenced on January 13, 1976, and ended on January 16, 1976 when the jury convicted the defendant on all six counts.

On February 27, 1976, Judge Conner ordered that the defendant be committed to a 90 day period for study and observation prior to the imposition of final sentence pursuant to Title 18, United States Code, Section 4208(b). Prior to commitment for that study, Yagid was enlarged on bail pending appeal.

Statement of Facts

I. Pre-Trial Proceedings

Calvin Yagid was indicted on December 30, 1974 and arraigned on January 13, 1975. His case was assigned to the Honorable William C. Conner, United States District Judge for the Southern District of New York. At a pre-trial conference on February 14, 1975, Judge Conner scheduled trial for April 21, 1975. (Tr. 2/14/75, 5)* A few days prior to this date, the Court adjourned the trial date due to Yagid's claim he was physically ill. (Tr. 11/3/75, 4) Yagid was admitted to Veterans Administration Hospital on April 22, 1975 and remained there through June 18, 1975. (App. D).

Throughout the period of his hospitalization the district court adjourned the trial a number of times. (Tr. 11/3/75, 4) until the trial date was ultimately changed to September 2, 1975 by Judge Conner. A few days

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* "Tr." refers to trial transcript; "Tr." followed by a date refers to the transcript of pre-trial proceedings on the noted date; "App." refers to Appellant's Appendix at the noted lettered section; "GX" refers to Government Exhibit; "Br." refers to Appellant's Brief.

prior to September 2, 1975, counsel for the Government received word from defense counsel that Yagid was again in ill health and planned to re-enter the Veterans Hospital at any moment. (Tr. 9/3/75, 1). At a conference held on September 3, 1975, Yagid's counsel informed the court that the defendant had entered the hospital and was in the intensive care unit suffering from the same condition which caused his hospitalization in April. The District Court adjourned the trial yet again, this time setting it down for September 29, 1976. (Tr. 9/3/75, 2).

On October 9, 1975, upon the request of the Government and with the consent of defense counsel, Judge Conner ordered Yagid to be examined by Dr. Iraj Iraj on November 3, 1975 to determine whether he was physically able to stand trial and to assist in his own defense. However, on November 3, 1975, the day of the scheduled examination, defense counsel moved to have a different physician appointed to conduct the examination, on the ground that the Government had selected Dr. Iraj.* The motion was denied on grounds of untimeliness and because no appropriate reason for a change of physician was set forth. (Tr. 11/3/75, 8). Judge Conner ordered the examination by Dr. Iraj to take place that afternoon

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* This objection was made even though the defense had initially consented to the order which specifically named Dr. Iraj as the physician who would conduct the examination. Defense counsel further objected to Dr. Iraj on the ground that the Government had improperly influenced him by writing a letter suggesting that the examination was for the purpose of "confirming" that Yagid was physically able to stand trial. However, the letter specifically provided in the alternative that the doctor should determine whether Yagid was physically unable to be tried. (App. E).

as scheduled, but invited defense counsel to have Yagid examined by a doctor of his own choice, as well. (Tr. 11/3/75, 11-12). That same day the Government was notified by Dr. Iraj's office that Yagid had not appeared for his scheduled examination. (Tr. 11/5/75, 1).

On November 3, 1975, the Government moved by order to show cause to have Yagid held in comtempt for failure to submit to the court-ordered physical examination. That motion was ultimately denied at a hearing on November 5, 1975, however, Yagid was again ordered to appear for an examination by Dr. Iraj to be held on November 7, 1975.

On November 7, 1975, Dr. Iraj examined Yagid and found him "able to withstand two or three days of trial." (App. F). This opinion was conveyed by the doctor to Judge Conner both telephonically and by letter. (Tr. 11/10/75, 2). Accordingly, the Government appeared on the scheduled trial date, November 10, 1975, ready for trial. However, because Dr. Iraj's letter to the court had suggested that a psychiatrist determine the defendant's mental competency to stand trial and to aid in his defense, Judge Conner ordered that a hearing be held on that issue. A mental competency hearing began on November 10, 1975 at which time Yagid's psychologist, Dr. Irving Barnett testified about Yagid's condition. Dr. Barnett, a clinical psychologist employed by the Veterans Administration, testified that he was assigned to treat Yagid after his hospitalization for physical ailments and that he had only treated Yagid during the previous two months. Dr. Barnett diagnosed Yagid as suffering from "anxiety reaction severe," a neurosis. (Tr. 11/10/75, 30, 41).

Judge Conner ruled that based on the testimony of Dr. Barnett alone and in view of the lack of any evidence

presented by the Government, Yagid "would be substantially impaired in assisting in his defense." (Tr. 11/10/75, 64-65). The court then granted an indefinite adjournment until the defendant was mentally competent to stand trial. (Tr. 11/10/75, 68).

On November 11, 1975, pursuant to the Government's request for a psychiatric examination by a psychiatrist not selected by the defendant, Judge Conner ordered Yagid to undergo a complete mental examination on November 13, 1975 by Dr. David Abrahamsen. (Tr. 11/10/75, 67; App. G). Dr. Abrahamsen was unable to conduct a proper examination on that date because of Yagid's abusive and threatening behavior. (Tr. 11/14/75 at 1-2). Yagid was again ordered by Judge Conner to be examined by Dr. Abrahamsen. This examination occurred on November 18, 1975 and December 2, 1975. In his report to the court, conveyed by letter dated December 4, 1975, Dr. Abrahamsen concluded that Yagid was able to understand the charges against him, to confer with a lawyer, to aid in his defense and to stand trial. (Tr. 1/12/76, 28; GX 2). The doctor further concluded that there was "little doubt that this man exaggerates his symptoms."

After receiving Dr. Abrahamsen's report, Judge Conner scheduled the trial for January 13, 1976, to be preceded, however, by a hearing on Yagid's mental competency. Before testimony in that hearing could be taken, defense counsel moved to expand the hearing to include defendant's physical capacity to stand trial. Judge Conner was receptive to this suggestion but required some threshold showing by defense counsel that there had been some change in defendant's physical condition since his examination by Dr. Iraj in November 1975. (Tr. 1/12/76, at 11, 126). At this juncture, defense counsel represented that he would endeavor to provide the court with an

affidavit setting forth changes in Yagid's physical condition since the examination by Dr. Iraj. (Tr. 1/12/76, 11-12). No such affidavit was ever filed.

On January 12, 1976, at the mental competency hearing, the Government presented its evidence of Yagid's mental competency, beginning with the testimony of Dr. Abrahamsen who testified that Yagid was mentally competent to stand trial. (Tr. 1/12/76, 12-65a). In addition, the Government offered the testimony of three laymen, Raymond Cabel, David Spitzer, and Israel Mechlowicz, each of whom testified that they had seen Calvin Yagid within the past two weeks at the union hall, that he appeared to function quite normally and that he exhibited none of the symptoms, physical or mental, which he exhibited in court. (Tr. 1/12/76, 66-121).

At the conclusion of the day's testimony on January 12, 1976, Judge Conner inquired of defense counsel whether he had witnesses to present and what the nature of their testimony would be. Defense counsel responded that he would call Yagid's psychologist, Dr. Barnett, and a medical doctor. (Tr. 1/12/76, 122). However, the following day, at the continued hearing no medical evidence was adduced. Instead, the defense called Dr. Barnett and another clinical psychologist, Dr. Leon Pomeroy. Dr. Pomeroy, a specialist in biofeedback training, testified that on the basis on one 45-minute session with Yagid that Yagid exhibited manifestations of anxiety and that there was an impairment in understanding. (Tr. 1/13/76, 134). However, the doctor was unable to determine the extent of the impairment due to the brevity of the examination. (Tr. 1/13/76, 136). After the hearing concluded, Judge Conner ruled Calvin Yagid was mentally competent to stand trial. (Tr. 1/10/76, 176-79).

II. The Trial

A. The Government's Case

The Government's evidence established that Calvin Yagid was subpoenaed on July 22, 1974 to appear before a special grand jury sitting in the Southern District of New York, which was then investigating loansharking and extortion in the garment district of New York City. (Tr. 26). Yagid was subpoenaed based upon information that he was a collector for certain loansharks and a loanshark in his own right (Tr. 73-241). After numerous adjournments (Tr. 38), Yagid appeared in the grand jury on October 7, 1974, took the oath, was advised of the nature of the investigation and of his constitutional rights. He then asserted his Fifth Amendment privilege, whereupon he received a grant of immunity pursuant to the provisions of 18 U.S.C. § 6002, *et seq.* (Tr. 26-27).

Under the grant of immunity, Yagid was asked whether he knew about certain money-lending transactions. Specifically, he was asked if he knew anybody to whom Whitey Liebowitz had lent money (Count One); if he knew anybody who lent money at rates of interest (Count Two); if he had ever tried to collect money from Harold Whellan (Count Three); if he knew of anybody who had borrowed money from Seymour Lebensfeld (Count Four); if he had ever had a conversation with Robert Kolbert in which he had discussed a loan of money by Seymour Lebensfeld to Kolbert (Count Five); and if he knew Stephen Adlman (Count Six). Yagid testified in response to each of these inquiries either that he did not know of the persons or transactions about which he was questioned, or, alternatively, that he could not recall.

At trial Harold Whellan testified that he had owed money to David Goldberg, a bookmaker, and that when

he was unable to pay Goldberg, Calvin Yagid came to see him to ask about that debt. (Tr. 85). Yagid visited Whellan a second time at the Whellan Coat Company, at which time Yagid told Whellan that he had come to collect the money owed to David Goldberg. (Tr. 85-85). This second conversation was recorded and the tape was introduced into evidence. (GX 5; Tr. 89). Whellan also testified that he borrowed $10,000 in June of 1968 from Whitey Liebowitz to pay off another loan of $5,000 with accumulated interest which he then owed to Calvin Yagid. (Tr. 79). Whellan stated he was present at a meeting where Whitey Liebowitz handed Yagid the $5,000 as payment of Whellan's debt to Yagid. (Tr. 79-81). Robert Kolbert testified that he had borrowed money from a Seymour Lebensfeld at interest and that when he had trouble making interest payments on that loan, Calvin Yagid came to collect. (Tr. 137-139). Two recorded conversations of Yagid's attempts to collect on the Kolbert loan were introduced into evidence. (GX 7, 9). During one of those conversations on October 3, 1973 Yagid told Kolbert that the loan was now owed to him rather than to Lebensfeld. (GX 7).

Stephen Adlman testified at trial that he had borrowed $15,000 from Seymour Lebensfeld on the condition that he pay back $20,000 in thirty days. (Tr. 203). Adlman testified that he too was visited by Calvin Yagid when unable to repay the money he owed to Lebensfeld. Adlman also testified that he had spoken with Yagid in or around the time of his grand jury appearance on October 7, 1974 and that Yagid was worried not only about his own grand jury appearance but that of Seymour Lebensfeld, Joseph Gambino, and Robert Kolbert as well. (Tr. 209-210). Adlman further stated that Yagid exhibited no abnormal behavior or physical ailments at the time and was able to respond to questions and to pursue a line of questioning. (Tr. 210).

B. The Defense Case

Dr. Irving Barnett, Yagid's psychologist testified that he was treating Yagid for a severe anxiety neurosis, with somatic features, which manifested itself in impairment of concentration; inability to listen to conversation; and difficulty in comprehension of conversation. (Tr. 247-48). Dr. Barnett also testified that he had examined a transcript of Yagid's grand jury testimony on October 7, 1974 and it was his opinion that Yagid's thinking processes had closed down during questioning. (Tr. 250, 258).

The defense also presented the testimony of Walter Kenney, Esq., an attorney who had represented Yagid during the grand jury proceeding. Mr. Kenney testified that Yagid's ability to communicate with him was almost nil; that he gave unresponsive answers to questions; and that he was nervous and apparently under the influence of drugs. (Tr. 300). On cross-examination Kenney admitted that after his client had told him that he thought he had made a mistake in the grand jury Kenney never asked the Government to give Yagid an opportunity to reappear before the grand jury and to correct his mistake. (Tr. 300).

The defendant's brother, Herbert Yagid, testified to his brother's long history of psychological problems.

C. The Rebuttal Case

On rebuttal the Government presented Dr. David Abrahamsen who had examined Yagid to determine his competency to stand trial. Dr. Abrahamsen concurred with Dr. Barnett's diagnosis that Yagid suffered from an anxiety neurosis, but he offered a further opinion that Yagid exaggerated his symptoms. (Tr. 371). Dr. Abra-

hamsen also testified that he, too, had examined the October 7, 1974 grand jury transcript and that it was his opinion based upon the examination of that transcript that Yagid was able to understand, to follow and to answer the questions put to him (Tr. 378).

The Government also presented the testimony of three lay witnesses, Raymond Cabel, David Spitzer and Israel Mechlowicz, each of whom had seen Yagid at a union hall about two weeks prior to trial. Each testified that Yagid was then conducting himself in a normal and businesslike fashion. (Tr. 356-362, 1128-1141).

POINT I

The District Court Did Not Abuse Its Discretion By Declining to Conduct A Hearing With Regard to Yagid's Physical Competence To Stand Trial.

Yagid's first point on appeal is his claim that he was denied due process by virtue of the district court's refusal to hold a hearing to determine his physical competence to stand trial. However, upon the record in this case, it is apparent that the district court was well justified in concluding that Yagid was physically competent to stand trial and that a hearing was not required on the issue.

It is settled that a defendant may not be tried under circumstances where his physical condition is so impaired as to defeat his constitutional rights to assist in the conduct of his defense or to give testimony. See *United States* v. *Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). However, the decision to grant a continuance on the ground that a defendant is physically unable to stand trial rests in the sound discretion of the

trial court. *Bernstein* v. *Travia*, 495 F.2d 1180, 1182 (2d Cir. 1974); *United States* v. *Bernstein*, 417 F.2d 641, 643 (2d Cir. 1974); *United States* v. *Knohl*, *supra*; *United States* v. *Silverthorne*, 430 F.2d 675 (9th Cir. 1970); *United States* v. *Alker*, 260 F.2d 135, 157 (3rd Cir. 1958). This Court has recognized the "tremendous responsibility of weighing the invariably unpredictable factor of a defendant's health against the Government's, indeed the public's legitimate interest in a fair and speedy disposition," and, in so doing, concluded that the district court is in the best position to assess the relevant factors in determining whether to proceed to trial where a defendant claims bad health. *Bernstein* v. *Travia*, *supra*.

Here, the record more than justified Judge Conner's determination to finally set this case for trial and to dispense with a hearing on physical competence. The trial of this defendant had, after all, been delayed numerous times based on claims of physical and mental incompetence. Specifically, Yagid's trial was originally scheduled by Judge Conner for April 21, 1975. (Tr. 2/14/75, 5). A new trial date was set when Yagid was hospitalized on April 22, 1975. (App. D). The trial date was then postponed a number of times by the court to September 2, 1975. (Tr. 11/3/75, 4). As the September 2, 1975 trial date approached, Yagid re-entered the hospital, a fact which was reported at the September 3, 1975 pre-trial conference. At that time, neither reports nor affidavits were introduced to document this hospitalization, which was established only on counsel's hearsay statement. Trial was rescheduled for September 29, 1975.

Finally the Government, with defense counsel's consent, obtained an order from Judge Conner appointing Dr. Iraj to examine Yagid on November 3, 1975 to determine his physical competence to stand trial. Yagid and his counsel choose to ignore this Court order by never appearing for this examination, prompting Judge Con-

ner to observe at a hearing on the Government's motion to have Yagid held in contempt that:

> "You have put yourself in a very bad position to argue that he is not fit to stand trial if you and or he have taken actions which makes it impossible for the government to have him examined." (Tr. 11/5/75, 4).

At this same hearing Yagid, now in violation of three separate Court orders (Tr. 11/5/75, 8), was ordered yet again to appear for examination by Dr. Iraj. At the hearing the Government again pressed its claim, as it had on November 3, 1975, that Yagid was malingering and that his incapacitations always seemed to occur in close proximity to either a scheduled court appearance or examination. Judge Conner noted in this regard that:

> ". . . his failure to appear on Monday before Dr. Iraj is certainly evidence that the Court will take into consideration in determining whether or not he is acting in good faith in asserting his physical incapacity to stand trial." (Tr. 11/5/75, 14).

On November 7, 1975, Dr. Iraj finally examined Yagid finding him "able to withstand two to three days of trial." (App. F). On November 10, 1975, Judge Conner finally, and properly, stated that in light of his communications with Dr. Iraj, a court-appointed physician who had examined Yagid, there was no evidence before the court to warrant a hearing on Yagid's physical capacity to stand trial.

Even then, however, the Court did not close the door on Yagid's application. The Court advised counsel on no fewer than four occasions in November, 1975, and January, 1976, that it was willing to receive medical affi-

davits on this issue which might supplement the record to warrant a hearing.* A district court may condition

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* During the November 10, 1975 mental competency hearing, defense counsel although asking for a hearing on physical competence, failed to provide the court with even an affidavit that indicated Yagid's physical inability to stand trial. As Judge Conner noted:

> "Up to now the Court has received no evidence or information which would indicate to it the necessity or desirability of having a hearing with respect to the defendant's physical ability to stand trial. You have submitted no opinion of any medical doctor that the defendant is physically unable to stand trial." (Tr. 11/10/75, 25).

At the end of November 10, 1975 mental competency hearing the Court again called upon defense counsel to adduce any evidence of physical incapacity.

> "THE COURT: Don't make an offer of proof unless you have been refused to have proof admitted. If you have any evidence let's have it." (Tr. 11/10/75, 64).

Of course the need for a hearing on Yagid's physical ability to stand trial became moot when the Court granted an indefinite continuance until the defendant was emotionally and physically competent to stand trial. (Tr. 11/10/75, 68). However, this same pattern was later to repeat itself at the January 12, and 13, 1976 mental competency hearing where defense counsel likewise requested a hearing on Yagid's physical competence to stand trial. Judge Conner was receptive, but required a threshold showing by defense counsel that there had been some change in Yagid's physical condition since his examination by Dr. Iraj in November 1975. Judge Conner noted in this regard:

> "Not unless there is some evidence submitted to me that would indicate there has been a change in Mr. Yagid's condition since the date of Dr. Iraj's opinion, which is November 12, 1975. If you come in with an affidavit from competent medical person, a doctor, that he has examined Mr. Yagid, and finds hi n unable to withstand trial, I will consider whether we will re-open that question, but as of now it is a closed matter and it would be re-opened only upon the submission to the Court of persuasive evidence that Mr. Yagid's condition has changed since the date of Dr. Iraj's opinion." (Tr. 1/12/76), 11).

At this juncture defense counsel represented that such affidavit would immediately be provided setting forth the changes in Yagid's physical condition since the examination by Dr. Iraj. (Tr. 1/12/76, 11-12). No such affidavit was ever filed.

a hearing upon a proper initial showing by a movant. *See, e.g., United States* v. *Leong*, 536 F.2d 993 (2d Cir. 1976); *United States* v. *Hall*, 523 F.2d 665 (2d Cir. 1975); *United States* v. *Nathan*, 536 F.2d 988, 991-92 (2d Cir. 1976). If the defendant had any evidence of physical incompetence to present at a hearing, he should have been able to give Judge Conner at least one affidavit of a medical doctor.

Given the failure of the defense to adduce any verification whatsoever of the claim of physical incompetence, coupled with the written medical report finding Yagid physically competent and a record which demonstrated malingering, Judge Conner was well within his discretion in denying the hearing.* In *United States* v. *Bernstein supra* at 643, this Court upheld the denial of a hearing on physical competence where the district court

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* Among the many indications of malingering in this record was the fact that Yagid requested and received five adjournments of his appearance before the grand jury. (Tr. 38). Although that fact was not specifically before Judge Conner at the time that he denied the hearing on physical competence, the district court was fully aware of the previously described series of adjournments of both the trial dates and the doctor's examinations. In addition, Dr. Abrahamsen testified that there was "...little doubt that this man exaggerates his symptoms," (Tr. 1/12/76, GX 2), and three laymen (Raymond Cabel, David Spitzer, and Israel Mechlowicz), testified that when not in court or under examination Yagid appeared to be functioning normally. (Tr. 1/12/76, 66-121, 356-362, 428-41). Finally, as additional evidence of malingering, the Government presented to Judge Conner a portion of a 1973 tape recording of the defendant advising a recently indicted associate, Robert Kolbert, that one need not get upset about indictments because the legal proceedings can be staved off for years. On the tape, Yagid advised Kolbert, as follows: "Ya wait. Ya wait til you get it off, you wait. You don't fall apart—you don't fall apart over these things. Hey, I got indictments against me and I'm waiting for years." (Tr. 11/3/75, 5; GX 9).

had before it an oral medical report finding the defendants competent to stand trial. Here, the denial of the hearing was even more firmly grounded.

Furthermore, as held in *United States* v. *Bernstein*, *supra*, a district court's abuse of discretion in determining a defendant's physical competence will "call for reversal only where there is a showing that the defendant's ability to defend himself was substantially impaired." 417 F.2d at 643. Yagid argues that his physical condition impaired his ability to defend himself in two ways: (1) it limited his mental awareness and (2) it prevented him from testifying on his own behalf. (Br. 23).

The first claim—that his mental awareness was affected—cannot be seriously raised where, as happened here, a mental competency hearing was held and defendant was unable to convince the court that he was mentally incompetent. Although the defense could have presented any evidence it wished to establish mental incompetency, it failed to offer any of the medical evidence which it had promised the court. Thus, the hearing on physical incompetence as it may have impaired mental awareness was, in essence, accorded to the defendant. Having failed to make a convincing case of mental incapacity at the time, Yagid cannot be heard now to claim that some additional, duplicative hearing was required to allow him to establish physical incompetency affecting his mental awareness.

As to the claimed inability of the defendant to take the stand due to his physical illness, there was no claim below that the nature of Yagid's bad health was such as to make his testifying a risk to his well-being. All of the medical data presented in the brief to this Court indicates that the defendant was suffering from anxiety

neurosis, blood clots of the lungs and that he was heavily medicated. There is no evidence in the record that any of these conditions would have been aggravated had the defendant taken the stand. Having failed to present any medical opinions to that effect below, and having failed to even argue that below, no prejudice can be claimed on this ground now.

POINT II

The District Court properly admitted the testimony of Dr. Abrahamsen.

Yagid's remaining point on appeal is his claim that the trial court erred in admitting the testimony of Dr. Abrahamsen on the Government's rebuttal case. This testimony was admitted at trial without any objection whatsoever on the ground now asserted as error on appeal. The failure to object waived the point for purposes of appellate review. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).*

However, assuming *arguendo* that the issue were to be considered on its merits, Yagid has failed to show that the admission of Dr. Abrahamsen's testimony was error. Yagid essentially contends that the testimony was

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* Anticipating and attempting to avoid the Government's waiver argument, Yagid argues that: "Because the error in admitting Dr. Abrahamsen's testimony is that it was violative of the notice requirement to *appellant*, the failure of counsel to object to the admission of the testimony did not waive appellant's right to relief on appeal." (Br. 29) (emphasis in original). This makes little sense and fails to provide any excuse for counsel's failure to apprise the district court that the admission of the testimony would later be assigned as error requiring a new trial.

improperly admitted because Dr. Abrahamsen examined him pursuant to an order requiring only an examination to stand trial. Relying on the authority of *United States* v. *Driscoll*, 399 F.2d 135 (2d Cir. 1968), Yagid argues that he was not given notice that the results of that examination would be used at his trial on the issue of mental competency to commit the offense. Had he been given notice, he further contends, "he would have been able to protect himself by assuring, for example, counsel's presence or requiring a video tape of the session." (Br. 29).

This argument is grounded on a fatally defective premise, namely, that Yagid had a right to counsel during the psychiatric examination. However, after the decision in *Driscoll* this Court explicitly held that a defendant does not have a right to the presence of counsel during such examinations. *United States* v. *Trapnell*, 495 F.2d 22, 24 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974); *United States* v. *Baird*, 414 F.2d 700, 711 (2d Cir.), *cert. denied*, 396 U.S. 1005 (1969). Thus, any lack of notice did not prejudice Yagid as he claims; if the notice had been given, he would still have been required to submit to the examination without being accompanied by counsel.*

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* The more recent decisions of this Court denying a right to counsel in a psychiatric examination suggest that the rationale of *United States* v. *Driscoll*, *supra*, has been eroded away. The Court in *Driscoll* assumed without deciding that if given notice, a defendant might be able to obtain procedural safeguards such as presence of his own representative. 399 F.2d at 138. Having since determined that the right to counsel does not apply in this setting, this Court has, we submit, removed any reason for continued adherence to the *Driscoll* decision.

The strength of *Driscoll* is also made questionable by virtue of the fact that it was a decision of a divided panel and one which this court later said should "be limited strictly to its

[Footnote continued on following page]

Yagid also attacks the admission of Dr. Abrahamsen's testimony on the ground that having conducted only an examination on mental competency to stand trial, the doctor "was not competent on the question of appellant's sanity at the time of the alleged perjury." (Br. 30). This argument incorrectly assumes that Dr. Abrahamsen utilized the earlier examination to attest to Yagid's sanity at the time of the offense. Instead, Dr. Abrahamsen only offered his conclusions as to Yagid's mental competency to stand trial and his expert opinion that the grand jury minutes reflected that Yagid was able to comprehend the proceedings. (Tr. 367-75, 375-80). The district court has wide discretion in determining the competency of an expert to testify, *Hamling* v. *United States*, 418 U.S. 87, 108 (1974); *United States* v. *Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), and it has equally wide discretion over the admission of rebuttal evidence, *United States* v. *Nussen*, 531 F.2d 15, 20 (2d Cir. 1976). Here, that discretion was not in any way abused.

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own facts." *United States* v. *Matos*, 409 F.2d 1245, 1247 fn. 2 (2d Cir. 1969). Other courts which considered *Driscoll* on this specific issue have rejected the majority holding and cited the dissent with approval. *United States* v. *Hunt*, 478 F.2d 357 (9th Cir.), *cert. denied*, 414 U.S. 850 (1973); *United States* v. *Mattson*, 469 F.2d 1234 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973); *United States* v. *Malcolm*, 475 F.2d 420, 424 (9th Cir. 1973); *United States* v. *Jacquillon*, 469 F.2d 380 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Peter D. Sudler being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 20th day of **September** he served **two** copies of the within **Brief in U.S. v. C. Yagid** by placing the same in a properly postpaid franked envelope addressed:

SHEILA GINSBERG, ESQ.
Legal Aid Society
Federal Defender Services Unit
Rm. 509
U.S. Courthouse - Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Peter D. Sudler

PETER D. SUDLER
Special Attorney
U.S. Department of Justice

Sworn to before me this
20th day of **September**, 1976

Jacob Lanfer

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